SEP 18 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 353

COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

DAVID A. WATTS,
WILLIAM N. HADDAD,
135 South LaSalle Street,
Chicago, Illinois.

WILLIAM V. KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.

BELL, BOYD, MARSHALL & LLOYD,
135 South LaSalle Street,
Chicago, Illinois.
of Counsel.

WITHERSPOON, WITHERSPOON & KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.
of Counsel.

SHAW & BORDEN CO. 312589

INDEX

		Page
(a)	Opinion Below and Preceding Opinions	1
(b)	Jurisdiction	2
(c)	Questions Presented for Review	2
(d)	Statute Involved	3
(e)	Statement	4
(f)	Reasons for Granting the Writ	10
	1. The Court of Appeals for the Ninth Circuit has Decided a Federal Question in a Way Probably in Conflict with Applicable Decisions of this Court	10
	Indefensible Activity	13
	2. The Court of Appeals of the Ninth Circuit has Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings	18
	Burden of Proof and Character of Evidence Required	19
(g)	Conclusion	22
	Appendix	i-xxiv

CITATIONS

Page

CASES:

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 229; 50 S. Ct. 206 ---------- 21

International Union v. Wisconsin Employment Relations Board, et al, 336 U. S. 245, 69 S. Ct. 516 ---------- 11, 12, 14

Joanna Cotton Mills Company v. N. L. R. B., 4th Cir., 1949, 176 F. (2d) 749 ---------- 16

N. L. R. B. v. Columbia Enameling & Stamping Co., 306 U. S. 292 at 300 ---------- 21

N. L. R. B. v. Fansteel Metalurgical Corporation, 306 U. S. 240, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599 ---------- 14

N. L. R. B. v. Goshen Rubber & Mfg. Co., 7th Cir., 1940, 110 F. (2d) 432 ---------- 20

N. L. R. B. v. Houston Chronicle Publishing Co., 5th Cir. 1954, 211 F. (2d) 848 ---------- 16

N. L. R. B. v. Jones-Laughlin, 301 U. S. 1, 45; 57 S. Ct. 615, 618 ---------- 11

N. L. R. B. v. Late Chevrolet Co., 8th Cir., 1954, 211 F. (2d) 643 ---------- 16

N. L. R. B. v. Local Union No. 1229, 74 S. Ct. 172, 346 U. S. 464 ---------- 13, 15, 16, 19

N. L. R. B. v. Montgomery Ward & Co., 8th Cir., 1946, 157 F. (2d) 486 ---------- 16

CITATIONS (continued)

Page

N. L. R. B. v. Sands Mfg. Co.,
306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682 ----- 14

N. L. R. B. v. Union Manufacturing Co.,
5th Cir. 1942, 124 F. (2d) 332 ---------- 19

N. L. R. B. v. U. S. Cold Storage Co.,
5th Cir. 1953, 203 F. (2d) 927 ---------- 17

Southern S. S. Co. v. N. L. R. B.,
316 U. S. 31, 62 S. Ct. 886, 86 L. Ed. 1246 ----- 14

STATUTES:

National Labor Relations Act, §1, et seq. 8
(1, 3 and 4), 29 U. S. C. A. §151, et seq, 158
(1, 3 and 4) ---------- 12, 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.----------

COWLES PUBLISHING COMPANY, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, Cowles Publishing Company, a Washington corporation, prays that a writ of certiorari be issued to review the decision of the Court of Appeals for the Ninth Circuit entered on June 28, 1954, modifying and affirming an order of the National Labor Relations Board upon its petition for enforcement of said order made August 20, 1953 (R. 23-28).

(a) OPINION BELOW AND PRECEDING OPINIONS

The opinion of the Court of Appeals on the present petition for enforcement of the order of the Board (App. ii-ix) is not yet reported. The decision of the Board prior to the enforcement proceeding is reported in 106 NLRB 131 (App. x-xv) (P. 23-29).

(b) JURISDICTION

The decision of the Court of Appeals was entered June 28, 1954. An order denying a petition for rehearing and petition to remand was entered on August 3, 1954. A decree enforcing the order was filed September 7, 1954 (App. xx). On August 10, 1954, an order staying issuance of mandate was entered (App. xvi-xvii) pending the filing, consideration and disposition by this Court of a petition for certiorari to be made by September 20, 1954. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10(e) of the National Labor Relations Act.

(c) QUESTIONS PRESENTED FOR REVIEW

1. Whether the discharge of certain part-time, unorganized and non-union "inserters," most of whom were local college students, by a newspaper with no labor dispute of any kind, no notice of any grievances, fancied or otherwise, no bad faith on the part of the newspaper, and with the employees presenting a surprise grievance as the paper came off the press and demanding an answer within 40 minutes, constituted an unfair labor practice within the meaning of Section 8 (a) (1) and (7) of the National Labor Relations Act, as amended by the Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U. S. C. A., §157, 158 (a) (1)?

2. Whether the discharge of the student inserters because they quit right in the middle of their job when the newspapers were coming from the press was a discharge "for cause" within the meaning of Section 10(c) of the National Labor Relations Act, as amended?

3. Whether the Court of Appeals departed from the accepted and usual course of judicial proceedings and permitted the Board to shift the burden of proof as to discriminatory motivation to the newspaper employer, and sanctioned such a departure by the Board which based its findings on the inadequacy of evidence by the newspaper employer to establish its asserted lawful reason for the discharge, i.e. quitting in the middle of the job, rather than the sufficiency of the evidence to establish any unlawful motivation?

In connection with this, a subsidiary question raised by the decision below is whether the Circuit Court of Appeals may disregard the uncontradicted testimony that Edmunds, the production manager, stated *eo instante* that the discharge was because the newspaper "could not do business that way."

(d) Statute Involved

The pertinent provisions of the National Labor Relations Act (61 Stat. 140, 146, 147, 65 Stat. 601, 29 U. S. C. (Supp. V), §157, 158, §160(c), 29 U. S. C. A.

§157, 158, 160(c)) are set forth in the Appendix, *infra*, pages xviii-xix.

(e) STATEMENT

Petitioner is a Washington corporation publishing a daily newspaper in Spokane, Washington, The Spokesman-Review, with a large Sunday edition. Petitioner employed part-time "inserters" to assemble the different sections of the Sunday paper (R. 32; 76-77). The 16 "inserter" employees involved in this proceeding were not members of a union, and no effort had been made at any type of labor organization at any time. Most of them were local college students, who worked an irregular number of hours which they were permitted to schedule largely at their own convenience (R. 32, 33; 183, 117, 137, 177 and 310). However, they were required to work every Saturday evening from 6:00 o'clock until all the Sunday papers were finally assembled, usually nine or ten hours later (R. 32, 184, 117).

During Saturday evening and until sometime between 2:30 and 4:00 a. m. Sunday morning, as a general rule the inserters would process four editions of the Sunday paper by manually assembling and inserting the newly printed sections of the paper as it came off the press (R. 296). It was essential that the four editions or runs of the newspaper go off according to schedule because there were various train and bus

schedules to meet, and consequently all the inserters reporting for work on a Saturday night were supposted to work on all four editions (R. 296, 297, 298). The very nature of the process depended on speed and in a matter of approximately 15 to 20 minutes every inserter was given papers after the respective starting times of the press (R. 296). For the evening of August 23, 1952, and the early morning of August 24, 1952, the starting times of the paper were as follows:

First Edition _____Plate 6:02 p. m., Press 6:06 p. m.
Second Edition ___Plate 6:26 p. m., Press 6:45 p. m.
Third Edition ____Plate 7:39 p. m., Press 7:40 p. m.
Fourth Edition ___Plate 9:21 p. m., Press 9:23 p. m.
(R. 393.)

The amount of piecework an inserter did and consequently the amount of pay he received depended upon his own industry or speed in manually inserting the sections of the paper (R. 295). Ordinarily at the end of the third edition the inserters were permitted to go and do as they pleased until the last edition (R. 296), but it was vitally important, as far as the first three editions were concerned, that they remain in the mailing room because of the tight train and bus schedules receiving the first three editions of the paper (R. 297, 298).

The inserters were paid on the basis of a piece-rate which varied in proportion to the weight of the sections assembled and the ability of the individual inserters

(R. 32; 119). The precise rate for a given section was often unknown until after that particular section had been inserted (R. 35; 119, 195). Some of the inserters were dissatisfied over this and also a shortage of locker-room facilities. Although there was some minor complaining about these matters, it was considered usual and no significance was attached by anyone to it and the complaining among the inserters themselves was never communicated to management (R. 117, 119, 121, 124, 153, 189, 331, 332, 368, 369, 370).

It is likewise undisputed that petitioner, prior to the night of August 23, 1952, had never manifested any hostility toward any individual inserter or to the inserters as a group, or manifested any hostility toward their organization into any union at any time or place, or ever opposed or interfered with their right to hold formal or informal meetings, and had no knowledge whatsoever of an informal meeting of the inserters held on August 17, 1952, in which a written resolution (Ex. 2) was drawn up by one of the inserters, Howard, demanding a pay increase of 20%, individual lockers, and the posting of petitioner's standard for computing the piecework. The Trial Examiner found that the execution and the presentation of this written resolution was given without any notice at all to petitioner (R. 44). This was amply brought out by the record (R. 121, 126, 138, 159, 185, 191, 194, 199, 227, 234, 372 and 390). Petitioner's production manager,

Edmunds, was the only supervisory employee of petitioner's who had authority to deal with such matters and the inserters knew this (R. 142).

The inserters, knowing that Edmunds, the production manager, was absent from the premises (R. 142) handed at 6:20 p. m., August 23, 1952, the written resolution (Ex. 2) to Munkers, a temporary foreman, who was informed that he should bring it to the attention of Edmunds, the production manager, promptly inasmuch as the inserters had decided to strike at 7:00 p. m. if their demands were not met (R. 39). At that time, 6:20 p. m., the first edition of the paper had already gone to press and the press time of the second edition was at 6:45 p. m. (R. 393). All the inserters ceased work in concert at 7:00 p. m. and left the mailing room at least ten minutes before Edmunds, the production manager, was even able to get to the plant from his home (R. 39). Edmunds and two other supervisory employees proceeded to the plant, arriving a little after 7:00 o'clock. Meanwhile, the papers continued to come from the press and the management of petitioner was fully occupied in getting replacements for the inserters.

These replacements in this piecework job that night in part came before 8:00 p. m. from a permanent list of former inserters and other employees and the employees of a printing plant. There was no evidence as to how many of these replacements were temporary or

permanent, or any testimony as to which of the 16 inserters involved in this proceeding had their piecework job taken by a permanent or temporary replacement that night before 8:00 o'clock.

At about 7:40 p. m. temporary foreman Munkers approached the inserters and said, "If any of you men want your jobs back, go upstairs and talk to Edmunds and do it one at a time" (R. 40; 210, 130, 397-398). However, the inserters presented themselves to Edmunds in a body at approximately 7:50 p. m. (R. 40-41; 211, 212, 85-86, 88). This meeting lasted but a few minutes and only Edmunds spoke (R. 41; 132, 89, 212-214). He described the inserters' action as "unprecedented," criticized the short notice they had given petitioner, and declared that petitioner newspaper could "not do business this way" (R. 41; 213, 132). Asserting that petitioner newspaper had "no other alternative," he concluded by informing the inserters: "Consequently, you gentlemen are all through" (R. 41; 213, 132, 250, 398, 409, 422, 429).

By virtue of the replacements obtained before this two-minute meeting petitioner was able to get its paper out that night (R. 41; 301, 361-362). On the following Friday, August 29, 1952, Howard, one of the inserters, as spokesman for the others, asked production manager Edmunds for their reinstatement, but the request was denied on the grounds that they had all been replaced (R. 43; 216, 217, 110, 134, 238-239, 372-373).

On the basis of the foregoing facts 16 of the inserters filed with the Board a charge that the petitioner newspaper, by discharging them, had engaged in an unfair labor practice. The Board filed a complaint based on charges of these 16 individual inserters, and after a hearing in which only testimony concerning seven out of the 16 individuals (R. 10) was taken, found that the 16 inserters had engaged in an economic strike on August 23, 1952, and that petitioner, by discharging the 16 inserters for striking, violated Section 8 (a) (1) of the Act (R. 46, 47). The Trial Examiner made detailed findings of fact, among them that the execution and presentation of the written resolution (Ex. 2) setting forth the grievances of the inserters came without any notice at all to petitioner (R. 44). The Board ordered petitioner to reinstate the inserters to their piecework jobs (one inserter, Orval Dean, did not desire reinstatement and his reinstatement was not ordered (R. 52, n5)), to post the usual notices and to cease and desist from engaging in conduct violative of Section 8 (a) (1) of the Act (R. 26, 27; 106 N. L. R. B. 131), and later petitioned the Court of Appeals for the Ninth Circuit for enforcement of its order.

The Ninth Circuit on June 28, 1954, entered its opinion and entered its decree (App. ii-ix) with two justices upholding the Board and one justice holding that the petition for enforcement should be dismissed. That court's majority opinion modified the Board's

order by eliminating paragraph 1(b) of the cease and desist order, but enforced the posting of notices provisions and the reinstatement with back pay provisions. Subsequently, that court entered an order denying a petition for rehearing and a petition to remand on behalf of petitioner on August 3, 1954, and on August 10, 1954, an order staying issuance of mandate was entered pending disposition of this Court of petitioner's petition for certiorari.

(f) Reasons for Granting the Writ

(1) THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED A FEDERAL QUESTION IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

If the inserters were discharged, it was for cause. They quit right in the middle of the job when the papers were coming from the press. They were like sailors who mutinied. There was no reason for their reckless conduct. As the dissenting opinion aptly pointed out:

> "The action of the Board officials indicates that they thought this course was eminently proper. If the theory is sound, every railroad union in America could quit, formulate a general demand for higher compensation throughout the nation, and give the railroads five minutes' notice to get the demands or all trains would cease to move.

> Responsible labor groups do not 'bargain' in that fashion." (App. viii-ix.)

Nevertheless, the majority opinion appears to condone this conduct and in so doing ignores the reason for the discharge.

In construing the Act, this Court has said in *N. L. R. B. v. Jones-Laughlin,* 301 U. S. 1, 45; 57 S. Ct. 615, 618, that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them;" that the employer "may not under cover of that right intimidate and coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation or coercion."

In *International Union v. Wisconsin Employment Relations Board, et al,* 336 U. S. 245, 69 S. Ct. 516, decided February 28, 1949 (rehearing denied May 2, 1949), this Court has pointed out:

> "* * * Section 7 of the Act expressly guarantees employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. *We do not interpret this to mean that it is unlawful for an employer to discharge an employee for any activity sanctioned by a union or otherwise in the nature of collective activity.*" (Italics ours.)

In the case at bar, with the record showing no discriminatory motives of the employer whatsoever, the Board must have followed a fixed interpretation that all work stoppages are federally protected concerted activities. However, this Court stated in the *Wisconsin Employment Relations Board case, supra,* at Page 523, after reviewing a number of Courts of Appeals' decisions from various circuits (not including the Ninth Circuit): "To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activity 'protected' would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions."

Indeed, Section 8(d) of the National Labor Relations Act states, in spelling out in detail what is meant by bargaining collectively:

> "For the purpose of this section, to bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees *to meet at reasonable times and confer in good faith* with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *" (Italics ours.)

Certainly the inserters ignored this public policy in selecting a period of 40 minutes in which the employer was to meet and accede to certain requests in the busiest period of the week while the papers were coming off the press. Nor can it be construed as a conference in "good faith" to select knowingly a time of 40 minutes when the management was not present.

Indefensible Activity

The inserters' strike falls outside the "concerted activity" for "mutual aid and protection" embraced by Section 7 of the Act. While these inserters had the undisputed right to strike, their total conduct was inherently unlawful (within the meaning of the Act) even though violence was lacking. It was an unlawful invasion of property rights. They knew that the four editions of the newspaper had to go off on a tight schedule to meet various train and bus schedules (R. 296, 297, 298). They knew that the very nature of their work depended on speed and in a matter of approximately 15 to 20 minutes every inserter would be given newspapers after the respective starting times of the press (R. 296). They knew that the newspaper had to be published on time. They were discharged solely because at a critical time they walked out of the mailing room "in a manner reasonably calculated to harm the company's reputation and reduce its income."

N. L. R. B. v. Local Union No. 1229, 346 U. S. 464, 74 S. Ct. 172, 176.

As this Court said in *International Union v. Wisconsin Employment Relations Board, supra,* at 524:

> "That Congress has concurred in the view that neither Section 7 nor Section 13 confers absolute rights to engage in every kind of strike or other concerted activity does not rest upon mere inference."

This Court has recognized that the phrase "concerted activity" does not make every union activity, for example, a federal right. The same principle should apply to these 16 individual student inserters. This Court has held that a sit-down strike, *N. L. R. B. v. Fansteel Metallurgical Corporation,* 306 U. S. 240, 59 S. Ct. 490, 83, L. Ed. 627, 123 A. L. R. 599, a mutiny, *Southern S. S. Co. v. N. L. R. B.,* 316 U. S. 31, S. Ct. 886, 86 L. Ed. 1246, and a strike in violation of a contract, *N. L. R. B. v. Sands Mfg. Co.,* 306 U. S. 332, 59 S. Ct. 508, 83 L. Ed. 682, must be withdrawn from the literal language of Section 7 of the Act.

Where the record here shows (a) no familiar sequence of events involving knowledge by management of the grievances, (b) no warnings or interrogatories of employees, or (c) no background evidence showing any anti-labor or anti-union animus of the newspaper, it is inconceivable that this newspaper should not be allowed to discharge these 16 part-time inserters who quit in the middle of a press run.

As this Court recently said in *N. L. R. B. v. Local Union No.* 1229, 346 U. S. 464, 74 S. Ct. 172, decided December 7, 1953, "In its essence, the issue is simple. It is whether these employees * * * were discharged 'for cause.' "

In that case this Court held there is no more elemental cause for discharge of an employee than disloyalty to his employer and pointed out that Section 10(c) of the Taft-Hartley Act provides that "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." In that case the employees were discharged because at a critical time in the initiation of the employer's television service, they distributed disparaging handbills calculated to harm the employer's reputation and reduce its income. In the case at bar the attack on the petitioner took the form of abandoning entirely the newspaper at a critical time as it came off the press.

As the dissenting opinion pointed out: "The inserters made abundantly plain that they wanted no palaver over the matter of compensation; that so far as they were concerned, the Sunday issue of the paper could remain in the plant." (App. viii.)

As this Court remarked in *N. L. R. B. v. Local Union No.* 1229, 74 S.Ct. 172 at 179:

> "Even if the attack were to be treated, as the Board has not treated it, as a concerted activity wholly or partly within the scope of those mentioned in Section 7, the means used by the technicians in conducting the attack have deprived the attackers of the protection of that section when read in the light and context of the purpose of the Act."

Here there was legitimate cause for the employees' discharge, and there could be no presumption that the discharge was illegal.

> *N. L. R. B. v. Montgomery Ward & Co.*, 8th Cir., 1946, 157 F. (2d) 486.

It was recently held in the same circuit, in *N. L. R. B. v. Late Chevrolet Co.*, 8th Cir., 1954, 211 F. (2d) 643, that the mere discharge of employees with or without reason is not evidence of intent to affect the rights of employees under the National Labor Relations Act.

The Fourth Circuit has held that the mere discharge of an employee is not an unfair labor practice.

> *Joanna Cotton Mills Company v. N. L. R. B.*, 4th Cir., 1949, 176 F. (2d) 749.

As was aptly said in another newspaper case recently, *N. L. R. B. v. Houston Chronicle Publishing Co.*, 5th Cir. 1954, 211 F. (2d) 848 at 854:

> "When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible to a misunderstanding and hard to prove or disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is, evidence possessed of genuine substance. In our opinion, this is not such a case."

In the case at bar the inserters were not discharged because they were attempting to bargain collectively, or even to present grievances, but as Edmunds, the production manager, stated *eo instante,* because the newspaper "could not do business that way." Finally, the attempt to distinguish between a temporary and permanent replacement to handle piecework made by the Trial Examiner (R. 42) was not sound as a matter of law and was not borne out by the record as a matter of fact. The rule has been stated in the Fifth Circuit that the employer is free to hire replacements for strikers at any time prior to their unconditional request for reinstatement.

> *N. L. R. B. v. U. S. Cold Storage Co.,* 5th Cir. 1953, 203 F. (2d) 927.

It is undisputed that no such request was made until six days after the walkout.

It is likewise undisputed that replacements for the striker-inserters were immediately necessary just as soon as the inserters stopped work, for the papers were even then coming off the presses. In these circumstances the advice of the majority opinion below—

> "We may add that had Edmunds, instead of summarily discharging these men, merely warned them that respondent would permanently fill their places in event they continued to strike, he would have been on safe ground,"—(App. vi)

is entirely unrealistic. The strikers had to be replaced in a matter of minutes. To say that *in this situation* management cannot discharge when the strikers were about to cease to exist because of replacements, is to require the manager to use an impractical degree of fine shading in his language.

(2) THE COURT OF APPEALS OF THE NINTH CIRCUIT HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Board was affirmed in its order to reinstate the discharged inserters when there was absolutely no evidence of any attempt to bargain collectively or any discriminatory motivation on the part of the petitioner employer towards any activity of the employees protected by the Act. In *N. L. R. B. v. Local Union No.* 1229, *supra,* this Court pointed out that "Many

cases reaching their final disposition in the Courts of Appeals furnish examples emphasizing the importance of enforcing industrial plant discipline and of maintaining loyalty as well as the right of concerted activity. The courts have refused to reinstate employees discharged for 'cause' consisting of insubordination, disobedience or disloyalty."

These legal principles should apply in the newspaper publishing business.

Burden of Proof and Character of Evidence Required

The Board, seeking reinstatement of the discharged inserters, had the burden of proving that the inserters "concerted activity" in presenting grievances, or any other "concerted activity" protected by the Act, was the basis for their discharge. In a number of other circuits the presumption is that an employer has not violated the statute. For example, the burden of proof is upon the one who asserts the fact to prove that the discharge of employees was because of union activity.

National Labor Relations Act, §1, et seq, 8 (1, 3 and 4), 29 U. S. C. A. §151, et seq, 158 (1, 3 and 4);

N. L. R. B. v. Union Manufacturing Co., 5th Cir. 1942, 124 F. (2d) 332;

N. L. R. B. v. Goshen Rubber & Mfg. Co., 7th Cir. 1940, 110 F. (2d) 432.

However, in this case the Board shifted the burden of proof to the newspaper employer and apparently ignored the nature of the newspaper business and the fact that the very nature of the inserters' piecework depended on speed (R. 296) and that they had to be replaced in a matter of minutes if the newspaper was to be put out on the streets in time. The Board brushed aside the asserted lawful reason for the discharge, i.e. quitting in the middle of the job, which was given by petitioner's production manager when he declared that petitioner newspaper could "not do business this way." (R. 41; 213, 132.) In other words, the decision of the majority opinion permitted the Board to shift the burden of proof and permitted the Board to base its findings on what it considered the inadequacy of the employer's justification, rather than upon any other sufficient evidence to establish an unlawful discharge. However, the Board always had the burden of proving discrimination and to prove that discrimination was employed in the discharging of the inserters because of their signing the written resolution (Ex. 2) by substantial evidence.

This Court in the case of *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 229, 59 S. Ct. 206, stated as follows:

> "Substantial evidence is more than a mere scintilla. It means that such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

This Court there held that the provision in the Act stating that the rules of evidence prevailing in courts of law and equity shall not be controlling in proceedings before the Board, does not justify orders without a basis in evidence having rational probative force.

This Court in *N. L. R. B. v. Columbia Enameling & Stamping Co.*, 306 U. S. 292 at 300, pronounced:

> "Substantial evidence is more than a scintilla and must do more than create a suspicion of evidence of the fact to be established."

Petitioner appreciates that this Court will not review evidence or weigh testimony and will ordinarily approve the Board's order unless it is unsupported, as here, by substantial evidence. In this case there was a complete failure of proof in support of the Board's order.

CONCLUSION

This was a very unusual proceeding with unique facts. The inserters' strike falls outside the "concerted activity" for "mutual aid and protection" embraced by Section 7 of the Act. A 40-minute ultimatum by employees, which was impossible to meet by the employer, surely is not a protected activity. As the dissenting opinion pointed out:

> "The circumstances here presented clearly indicate that the time element made bargaining of any sort an utter impossibility";

and as the writer of the dissenting opinion further pointed out:

> "Nothing in this record remotely suggested that Edmunds possessed authority to summarily grant the demanded raise without consultation with the owners of the newspaper. The fact that even the opportunity for such a consultation was completely foreclosed by the terms of the wage demand is a circumstance which seems to have absolutely no significance in the eyes of the Board officials." (App. viii.)

It is respectfully submitted that the importance of the questions involved to the newspaper publishing business in the Ninth Circuit and to every employer

generally and every newspaper in the country particularly is such as to require a full and complete hearing by this Court and a consequent reversal of the judgment of the Court of Appeals.

Respectfully submitted,

DAVID A. WATTS,
WILLIAM N. HADDAD,
135 South LaSalle Street,
Chicago, Illinois.

WILLIAM V. KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.

BELL, BOYD, MARSHALL & LLOYD,
135 South LaSalle Street,
Chicago, Illinois.
of Counsel.

WITHERSPOON, WITHERSPOON & KELLEY,
1114 Old National Bank Bldg.,
Spokane, Washington.
of Counsel.